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No. 84-333

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEVE RICHARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court improperly sentenced him under a mechanical sentencing policy, that the district judge should have recused himself, and that the penalty provisions of 21 U.S.C. 841 deny him equal protection.

1. Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiracy to possess some 2000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to nine years' imprisonment. The court of appeals affirmed (Pet. App. 1-7).

After the verdict was returned the judge stated to the jury:

> I have established, say, in marijuana cases, a certain minimum sentence. And I don't like it. But at least in this area, different from Florida and New York, Judge

> Hawkins and I are determined we are going to wipe it out. * * * I have established a policy that if somebody who is a truck driver, for instance, or who is an unloader, and with no previous history of marijuana crime is going to get a certain amount.

Pet. App. 6. Pointing to these statements, petitioner filed a motion under 28 U.S.C. 144 requesting the district judge to recuse himself from sentencing.[1] The judge denied the motion, ruling that the recusal motion had been filed out of time (C.A. App. 291),[2] and that, in any event, the quoted remarks indicated "at best, * * * only a judicial bias, not a personal bias" (*id.* at 294). The court then concluded that petitioner was "at the top of the totem pole" of the conspiracy (*id.* at 307), and it sentenced him to nine years' imprisonment.

The court of appeals affirmed petitioner's conviction and declined to disturb his sentence. The court concluded that the district judge was correct in declining to recuse himself because the "bias" he expressed "is judicial, not personal, since it does not stem from an extra-judicial source" (Pet. App. 7). Further, the court below ruled that any error on the recusal question was harmless: "At the actual sentencing, the district judge clearly did not follow a mechanical sentencing policy. Rather, he noted a variety of individualized considerations that prompted him to impose a nine-year

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[1]Section 144 provides that recusal is required when a party "makes and files a timely and sufficient affidavit that the judge * * * has a personal bias or prejudice either against him or in favor of any adverse party."

[2]Petitioner was convicted and the challenged remarks were made on March 9, 1983. Petitioner's recusal motion was filed on July 7, 1983, the day of his sentencing hearing. See C.A. App. 3. As noted above, 28 U.S.C. 144 requires that recusal motions and affidavits be filed in a "timely" fashion.

sentence * * *" (*ibid.*).[3] Finally, the court of appeals rejected petitioner's contention that 21 U.S.C. 841 violates equal protection concepts because it imposes stiffer penalties for trafficking in more than 1000 pounds of marijuana than it does for trafficking in other controlled substances.[4] The court explained that Congress's "decision to treat marijuana trafficking differently from trafficking in other * * * drugs was reasonable in light of common knowledge that, being more widespread, it posed a greater threat to public health" (Pet. App. 5).

2. In this Court, petitioner repeats the contentions rejected below. But as the court of appeals concluded, all are without merit.

Petitioner's argument (Pet. 5-7) that the district judge applied a mechanical sentencing policy finds no support in the record. As the court of appeals noted, the trial court based petitioner's sentence on "a variety of individualized considerations" (Pet. App. 7), including the depth of his involvement in the conspiracy and his apparently broad experience in the marijuana trade (C.A. App. 305-307). Indeed, in setting petitioner's term of incarceration, the judge explained that he "used every bit of information [he] had before [him]" (*id.* at 307). Thus the judge gave the various co-conspirators differing sentences, depending upon each one's degree of involvement in the crime;

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[3]The court of appeals did not address the district court's ruling that the recusal motion had not been filed in a timely fashion.

[4]Under 21 U.S.C. 841(b)(6) and 846, the maximum punishment for trafficking in or conspiring to traffic in more than 1000 pounds of marijuana is 15 years' imprisonment and a $125,000 fine. If the offense involves less than 1000 pounds of marijuana, or involves any quantity of other non-narcotic drugs, the maximum penalty is five years' imprisonment and a $15,000 fine. 21 U.S.C. 841(b)(1)(B).

petitioner's sentence was itself six years below the statutory maximum (see Pet. App. 7).[5]

Similarly, the court of appeals was correct in concluding that the district judge need not have recused himself. Recusal is appropriate only when a party alleges personal bias that "stem[s] from an extrajudicial source." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966). "Thus, a motion for disqualification ordinarily may not be predicated on * * * a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from [a judge's] experience on the bench." *Phillips* v. *Joint Legislative Committee*, 637 F.2d 1014, 1020 (5th Cir. 1981). In this case, of course, the district judge's remarks did not indicate any personal prejudice against petitioner; they suggested only that drug trafficking is a serious crime and should be punished accordingly.[6] Recusal is not warranted in such circumstances. See *United States* v. *Serrano*, 607 F.2d 1145, 1150-1151 (5th Cir. 1979), cert. denied, 445 U.S. 965 (1980).[7]

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[5]As the district judge noted, even in his post-verdict remarks he did not suggest "that I did not consider * * * each defendant on a case-by-case basis" (C.A. App. 294). And while those remarks suggested that punishment is appropriate in marijuana cases, the judge explained that such a view "doesn't indicate that I've got any — what the minimum sentences are, one; or two, that I don't consider each case" (*ibid.*).

[6]The Third Circuit has suggested that recusal is appropriate when the district judge is biased against a class of offenders, such as those "charged with violation of Selective Service laws." *United States* v. *Thompson*, 483 F.2d 527, 529 (1973). But the court of appeals in that case emphasized that the district judge had declined "to tailor the sentence imposed to the circumstances surrounding each individual defendant." *Ibid.* (footnote omitted). Here, the judge did base petitioner's sentence on individualized considerations.

[7]In any event, because the district court's use of an individualized sentencing policy made any error in its recusal ruling harmless — and because petitioner has not challenged the district court's holding that the recusal petition was not timely filed (see note 2, *supra*) — review on this issue plainly is not warranted.

Finally, the penalty provisions of 21 U.S.C. 841 do not deny petitioner equal protection. Congress enhanced the penalties for trafficking in large quantities of marijuana because the previously existing "penalty structure, with respect to marihuana, [was] inadequate to deter individuals and major criminal organizations involved in extensive trafficking operations. Law enforcement officials have testified repeatedly that the financial benefits of large scale marihuana trafficking are so lucrative that current criminal sanctions are viewed as an accepted cost of doing business." S. Rep. 96-916, 96th Cong., 2d Sess. 14 (1980). See 126 Cong. Rec. 11791 (1970) (remarks of Rep. Carter). Given the substantial nature of the marijuana trade, Congress's decision to increase the applicable penalties plainly was rational. See *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971). That Congress did not increase the penalties for trafficking in other types of drugs (see note 4, *supra*) does not affect the propriety of its action with respect to marijuana; the legislature may act "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).[8]

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[8]Petitioner's argument (Pet. 11) that Congress acted arbitrarily in choosing 1000 pounds as the threshhold for imposing enhanced penalties is without merit. Congress believed that operations involving such quantities were lucrative enough to deserve substantial punishments. See 126 Cong. Rec. 11791, 11792 (1980). A determination of this sort "does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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